

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	)	
	)	
KODY BROWN, MERI BROWN,	)	
JANELLE BROWN, CHRISTINE	)	
BROWN, ROBYN SULLIVAN,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2:11-CV-652CW
	)	
GARY R. HERBERT, MARK	)	
SHURTLEFF, JEFFERY R. BUHMAN,	)	
	)	
Defendants.	)	

Transcript of Motions for Summary Judgment

BEFORE THE HONORABLE CLARK WADDOUPS

January 17, 2013

Karen Murakami, CSR, RPR  
144 U.S. Courthouse  
350 South Main Street  
Salt Lake City, Utah 84101  
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1 Salt Lake City, Utah, Thursday, January 17, 2013

2 \* \* \*

3 THE COURT: We are here in the matter of  
4 Brown and others v. Herbert and others, case  
5 2:11-cv-652. Will counsel please state their  
6 appearance.

7 MR. TURLEY: Good morning Your Honor,  
8 Jonathan Turley and my colleague Adam Alba here  
9 representing the Brown family.

10 THE COURT: Thank you.

11 MR. JENSEN: Good afternoon Your Honor,  
12 Jerrold Jensen and Tom Roberts on behalf of the  
13 defendant.

14 THE COURT: Thank you. We are here for  
15 argument on cross-motions for summary judgment. And in  
16 order to fix the arguments clearly in my mind, it would  
17 be helpful if we could start with the defendant.  
18 Mr. Jensen, if you would come forward.

19 As a preliminary matter, as I have read the  
20 papers and as I understand the position of the defense,  
21 the defendant, there really are no disputed issues of  
22 fact here; is that correct?

23 MR. JENSEN: That's essentially correct,  
24 yes.

25 THE COURT: I understand you to make some

1 legal arguments as to the significance of some of those  
2 facts, but there is no evidence presented to find that  
3 the facts are otherwise than stated by the plaintiffs in  
4 this case; is that correct?

5 MR. JENSEN: We referenced a couple of facts  
6 that we took some issue with, but the overall thrust of  
7 it there's no dispute.

8 THE COURT: Let's make sure that we're on  
9 the same page as to those facts. As I understand it,  
10 you raised concerns about paragraphs 3, 11, and 32,  
11 which were references that you disagreed with as to the  
12 intent of the drafters of the criminal statute; is that  
13 correct?

14 MR. JENSEN: That's correct.

15 THE COURT: And actually, while you disagree  
16 with that statement, the state has provided no evidence  
17 to support any contrary intent of the drafters other  
18 than what's in the statutes themselves.

19 MR. JENSEN: That's correct.

20 THE COURT: The defendant also objected to  
21 paragraph 20, which references statements made by the  
22 office of the defendant, not directly by the defendant  
23 himself. As I understand your position, you're not  
24 denying that the statement was made, simply that it was  
25 not made with the intent of the defendant to be bound by

1 it.

2 MR. JENSEN: That is mostly correct.  
3 Mr. Buhman would probably word it slightly different,  
4 Your Honor, and I don't know that it makes a big  
5 difference. But he would say, as it was reported in the  
6 paper, he has no knowledge that those statements were  
7 actually made or that they were made in the wording that  
8 was reported in the press, but it's a minor issue.

9 THE COURT: All right. Now, second is in  
10 its opposition to this the defendant has chosen -- well,  
11 let me preface this. The plaintiff has made arguments  
12 that under six different clauses of the United States  
13 Constitution that there is a violation -- or at least a  
14 constitutional problem. The defense chose in its  
15 opposition not to respond separately to each of those  
16 counts. Do you now wish to make an argument as to each  
17 of those counts, particularly the Due Process Clause,  
18 the Equal Protection Clause, the Free Exercise Clause,  
19 the Establishment Clause, the Free Speech Clause, and  
20 the Freedom of Association?

21 MR. JENSEN: Well, I think we addressed the  
22 Due Process Clause in our reference to the Lawrence  
23 case, which is that's what that is about. I think we  
24 addressed our Free Exercise Clause when we referenced  
25 the Reynolds case. The Potter case also deals with the

1 due process right of privacy. So those were the ones we  
2 focused on as the principal arguments of the plaintiff.  
3 It was kind of a kitchen sink argument, Your Honor, I  
4 mean we threw in everything plus the kitchen sink.

5 THE COURT: Are you talking about your  
6 opposition or are you talking about the plaintiffs'  
7 analysis?

8 MR. JENSEN: The plaintiffs. There are a  
9 litany of theories and --

10 THE COURT: I think their argument, as I  
11 understand it, is that they say there are problems under  
12 each one of those clauses, and the defendant chose not  
13 address most of the arguments.

14 MR. JENSEN: The defendant chose to say that  
15 the Tenth Circuit has dealt with this issue twice in the  
16 last five years and has said that the precedent is clear  
17 and controlling, that there is a wealth of precedent  
18 that it is persuasive, and we relied upon those cases of  
19 the Tenth Circuit.

20 THE COURT: All right. Well, I'm going to  
21 give you a little further opportunity to explain your  
22 position. Let's start with the due process claim.  
23 First of all, Lawrence I believe is the latest  
24 expression of the Supreme Court of the rights under the  
25 Due Process Clause. And would you start as to what your

1 position is as to what the correct standard of review  
2 under the Due Process Clause is.

3 MR. JENSEN: The correct standard of review  
4 in this case, because we're not dealing with a  
5 fundamental right or a suspect class, would be a  
6 rational basis.

7 THE COURT: Tell me why you believe we're  
8 not dealing with a fundamental right.

9 MR. JENSEN: There is no court in this  
10 country that has held that the practice of polygamy is a  
11 fundamental right.

12 THE COURT: Let me ask you, to further  
13 understand your position on this, what is it that  
14 constitutes -- what is the conduct that distinguishes  
15 this behavior as being polygamist behavior?

16 MR. JENSEN: Well, when you say "this  
17 conduct," I'm --

18 THE COURT: Let me explain further. Let's  
19 assume that a man chooses to have intimate relationships  
20 with three different women, each of whom resided in  
21 different residences, and he has children with all of  
22 them, would that be violative of -- would that be  
23 polygamist conduct?

24 MR. JENSEN: Is he married to any of them  
25 legally?

1 THE COURT: Isn't that the question?

2 MR. JENSEN: I mean you've stated a fact.  
3 I'm trying to understand the clarification.

4 THE COURT: Let's assume that he does not  
5 have a marriage license or recognized public document  
6 saying he's married to any of them.

7 MR. JENSEN: That would not be -- I don't  
8 think that would be termed polygamy because there's no  
9 marriage.

10 THE COURT: Would that be a fundamental --  
11 would his right to engage in that conduct be a protected  
12 fundamental right under the Due Process Clause?

13 MR. JENSEN: Marriage is a fundamental  
14 right. I don't know that that conduct is a fundamental  
15 right. The Lawrence case stands for the principle --

16 THE COURT: Let me tell you what you say in  
17 your brief.

18 MR. JENSEN: Okay.

19 THE COURT: You say that, As applying  
20 Lawrence, the present case, the State of Utah is in  
21 complete accord with applying the holding of Lawrence to  
22 plaintiffs' intimate sexual conduct in the home.  
23 Neither Utah's constitutional provision banning polygamy  
24 nor the state's bigamy statute criminalizing polygamy  
25 prohibit plaintiffs' private sexual conduct. In the



1 hypothetical I've given you that would be the  
2 plaintiffs' private sexual conduct, his intimate sexual  
3 conduct in the home, his intimate relationships with  
4 three different women, and having children with those  
5 three different women, you seem to say that that's  
6 recognized under Lawrence as a fundamental right. Are  
7 you now disagreeing with that?

8 MR. JENSEN: No, I think that's right.

9 THE COURT: So now what is the  
10 distinguishing characteristic between that conduct and  
11 the conduct that you argue is alleged to be criminalized  
12 by this statute?

13 MR. JENSEN: Well, the conduct is  
14 criminalized by the statute where a man has a civil  
15 marriage, or a recognized civil marriage with one of the  
16 women.

17 THE COURT: Now, when you say "recognized  
18 civil marriage," you mean a legally-recognized civil  
19 marriage.

20 MR. JENSEN: Legally-recognized civil  
21 marriage, and then has what they hold themselves out to  
22 be as another marriage to additional spouses.

23 THE COURT: Let's assume your situation,  
24 that a man is legally by law recognized as married to  
25 one woman and then he has intimate sexual relationships

1 continuing with two other women, but he doesn't make any  
2 professions of any commitment to these women, he just  
3 engages in adulterous conduct. Does the statute come  
4 into play in those circumstances?

5 MR. JENSEN: I don't think it does. The  
6 cohabitation would apply if they were living in one  
7 household and cohabitating as a man and plural wives.

8 THE COURT: Now, let's suppose in that  
9 same --

10 MR. JENSEN: The situation you presented is  
11 no different than someone having an affair, which --

12 THE COURT: Okay. Would strict scrutiny be  
13 the appropriate standard under the Due Process Clause to  
14 analyze this conduct?

15 MR. JENSEN: To analyze the conduct of what?

16 THE COURT: That we've just been talking  
17 about, the man that's legally married to one woman but  
18 has adulterous relationships and children with two other  
19 women.

20 MR. JENSEN: No, I don't think there's a  
21 fundamental right to have an adulterous relationship.

22 THE COURT: Isn't that what I just read from  
23 your brief that you just said you agreed that there was  
24 a fundamental right?

25 MR. JENSEN: Well, but the Lawrence -- yes,

1 the Lawrence case says there is a fundamental right to  
2 have intimate sexual relations.

3 THE COURT: And it doesn't limit it to one  
4 person.

5 MR. JENSEN: No, doesn't limit it to one  
6 person.

7 THE COURT: So you would agree under that  
8 circumstance if there was a law attempting to prohibit  
9 that behavior it would have to be analyzed under strict  
10 scrutiny.

11 MR. JENSEN: Yes.

12 THE COURT: Now, let's -- to understand your  
13 position, let's assume the same scenario, legal marriage  
14 to one woman, intimate relationships with two additional  
15 women, but as to one of those women he makes a public  
16 pronouncement that says I'm committed to this woman, I'm  
17 going to take care of her for the rest of her life, does  
18 that change the analysis?

19 MR. JENSEN: Well, I don't know that it  
20 changes the analysis. The polygamy aspect of this  
21 requires that there be a marriage of some sort, a second  
22 or third or fourth marriage.

23 THE COURT: But that's the problem is  
24 deciding what constitutes a marriage for purposes of  
25 this act. Does the public pronouncement that I intend

1 to be committed to this woman, I will take care of her  
2 and her children for as long she lives, is that enough  
3 to make a marriage?

4 MR. JENSEN: I'm not sure that's enough to  
5 make a marriage, no.

6 THE COURT: Okay. Let's suppose that he  
7 says the same thing, but he says it to his Jewish rabbi,  
8 does that now become a polygamist marriage? And the  
9 rabbi says I bless you and recognize you as husband and  
10 wife.

11 MR. JENSEN: Well, if they are holding  
12 themselves out as husband and wife, I would recognize  
13 that as a marriage.

14 THE COURT: So is it the recognition by a  
15 religious organization that it believes that they are  
16 living together in a recognized relationship by that  
17 religion sufficient?

18 MR. JENSEN: No, no, no.

19 THE COURT: What is the defining conduct  
20 that takes this out of being under strict scrutiny?

21 MR. JENSEN: I think it's the representation  
22 that they make to the world as to what is their  
23 relationship. If they make it as husband and wife, then  
24 that constitutes marriage under the statute.

25 THE COURT: If they say we're not husband

1 and wife, we just live together, then it's not under the  
2 statute.

3 MR. JENSEN: Then it's not governed under  
4 the statute.

5 THE COURT: Let's assume that you are  
6 correct that a rational test applies there, tell me what  
7 rationalization the state has to prohibit the difference  
8 between a person saying I'm committed to this woman and  
9 we live together as husband and wife, as opposed to I'm  
10 committed to this woman, but we just live together, what  
11 is the societal interest that you think is rationally  
12 protected by criminalizing that conduct?

13 MR. JENSEN: I don't think there's any  
14 question about that, Your Honor. What's rational about  
15 criminalizing it is the children that are produced by  
16 the polygamist marriages.

17 THE COURT: There's no difference between  
18 the two, as I can see it.

19 MR. JENSEN: As far as --

20 THE COURT: They're living together, they  
21 have children together, he said I'll take care of you,  
22 he just doesn't call her his wife. Does the fact that  
23 he calls her a wife entitle the state to criminalize the  
24 conduct?

25 MR. JENSEN: It does because of the

1 criminality that comes out of polygamous unions and in  
2 the polygamist communities and the harm that is  
3 perpetrated on women, and particularly young girls, but  
4 it also applies to young boys.

5 THE COURT: All of that is irrelevant to  
6 this case. Isn't your argument way overbroad?

7 MR. JENSEN: No, because we're talking about  
8 the polygamy statute, the bigamy statute.

9 THE COURT: Yes, but we're --

10 MR. JENSEN: Why does the state have a right  
11 to criminalize that? And the answer is is because of  
12 the criminality that comes out of the polygamist  
13 communities, and the stories are replete about that and  
14 it goes on and this state has a history of it for a  
15 hundred or more years.

16 THE COURT: But all of that criminality has  
17 separate statutes that deal with it in a manner that  
18 there is no evidence that is not completely satisfactory  
19 to address those problems.

20 MR. JENSEN: Well, the problem is that  
21 they're such insular societies that we -- that law  
22 enforcement can't address those problems, so that the  
23 means of doing it is to criminalize the actual  
24 polygamist marriages.

25 THE COURT: And the factor that you think

1 makes the difference is the fact that in one case the  
2 man says she's my wife and in the other case he says I  
3 just live with her.

4 MR. JENSEN: Well, you know what, the law  
5 has to draw a line somewhere.

6 THE COURT: They have to be rational lines,  
7 they have to be supported with some reason. Tell me the  
8 reasons.

9 MR. JENSEN: Why is drunkenness at .08 and  
10 not .07? There is a line drawn somewhere. And the fact  
11 is people tend to be married when they have children.  
12 Do we criminalize those who have children out of  
13 marriage? We do not. But those who hold themselves out  
14 to be married and have children, there are such harms  
15 that we have seen in the history of this state that have  
16 been generated from that that the legislature has made  
17 the decision to criminalize those unions. That's  
18 perfectly rational to me, Your Honor.

19 THE COURT: Could the state make the  
20 decision that we're going to criminalize every person  
21 that has an illegitimate child under the Constitution?

22 MR. JENSEN: No, I think not.

23 THE COURT: I think that's what the Lawrence  
24 case stands for, you couldn't criminalize it. So  
25 there's got to be something at play here more than just

1 the fact that there are harms to children being born in  
2 illegitimate relationships. What I'm looking for is you  
3 to help me find what is that distinguishing factor? And  
4 frankly on the face of this history it appears to be  
5 religion.

6 MR. JENSEN: Well, there is no question that  
7 polygamy is associated with religion in this state. Not  
8 all of the cases that have been prosecuted in this state  
9 are against people that assert religion as a defense.  
10 There has been cases in which there was not religion.

11 THE COURT: But aren't those cases all where  
12 there was legally recognized marriages claimed as to  
13 both spouses?

14 MR. JENSEN: Yes, yes, yes.

15 THE COURT: That's a different scenario than  
16 what we're talking about here.

17 Let me go to the next matter, which is the  
18 equal protection claim --

19 MR. JENSEN: Let me come back to this,  
20 though, because not all of the harms that are talked  
21 about in our society dealing with the polygamist  
22 communities relate to just children. There are a lot of  
23 harms that are imposed upon women, and the literature is  
24 replete with it, and we can supply the court with those  
25 stories if you want, but essentially the women are



1     subjected, they're exploited, they have children on a  
2     repeated basis, they have no financial independence,  
3     they are unable to assert themselves, they are unable to  
4     leave that situation if they want, they have a high  
5     degree of health problems, higher than normal in  
6     society, they have a higher degree of trauma, they have  
7     a higher degree of dissatisfaction in their marriages  
8     because the marriages tend to be -- there's an age gap  
9     between the women and the men. They become widows at a  
10    much earlier age, more of them are on welfare than in  
11    the society at large. I mean the list goes on and on.  
12    They receive more Medicaid than in society at large.  
13    There are harms that apply to them as well.

14                 THE COURT: Well, all of that may be true,  
15    but you chose not to present any evidence to support any  
16    of those positions in this case.

17                 MR. JENSEN: Well, I've talked about social  
18    harms as to -- we've certainly talked about social  
19    harms.

20                 THE COURT: But you've presented no evidence  
21    to support your assertions that you just made. You  
22    accepted the facts of the plaintiffs in this case.

23                 MR. JENSEN: Well, we pointed out stories of  
24    harms.

25                 THE COURT: But, yes, you argued them, but

1 you didn't provide any evidence to the court or did you  
2 provide the plaintiffs an opportunity to test those  
3 allegations with cross-examination or evidence of its  
4 own.

5 MR. JENSEN: We haven't ever had that  
6 opportunity, Your Honor.

7 THE COURT: Of course you did. That's what  
8 summary judgment is about.

9 MR. JENSEN: This is a test, this is a  
10 facial challenge to a statute of the State of Utah.

11 THE COURT: And also as applied to these  
12 specific plaintiffs.

13 MR. JENSEN: Well, it hasn't been applied to  
14 them at all. It's a facial challenge. It's not an as  
15 applied challenge. And the criteria for determining  
16 whether or not the legislature has made a rational  
17 decision in criminalizing the activity is not scientific  
18 proof or putting before this court all of the evidence  
19 that may be out there to determine that. The question  
20 is is there a rational reason for the legislature to  
21 make the decision it's made. And given the harms that  
22 we've pointed out, I think that's highly -- we have a  
23 page limitation, Your Honor, as to what can be submitted  
24 here.

25 THE COURT: Well, there was no page

1 limitation imposed on you.

2 MR. JENSEN: Oh, I asked Mr. Turley if he  
3 would allow me to file extended pages, after I granted  
4 him that, and he refused.

5 THE COURT: It's well accepted in the  
6 community that I've never once denied anyone filing a  
7 brief because of page limits. That's not -- and your  
8 page limit didn't even come close to the allowed page  
9 limit.

10 MR. JENSEN: On the original memorandum it  
11 did not. On the reply it did. We had to cut out a lot  
12 of material to comply with the page limitation. We  
13 could have gone on and on about the harms.

14 THE COURT: Let's go to the next element,  
15 which is the equal protection claim. What's the  
16 appropriate standard of review under the equal  
17 protection claim?

18 MR. JENSEN: Rational review.

19 THE COURT: Why isn't it heightened  
20 scrutiny?

21 MR. JENSEN: I don't even see how the Browns  
22 can assert equal protection. I mean they're a class of  
23 one.

24 THE COURT: Well, you just told me there was  
25 a whole class of many people practicing polygamy which

1 you believe provide a social harm. Aren't they part of  
2 a discrete and insular minority, people who believe in  
3 and profess to practice polygamy?

4 MR. JENSEN: Yes.

5 THE COURT: Doesn't that standard require  
6 that the court apply heightened scrutiny?

7 MR. JENSEN: Well, maybe it does. I would  
8 think it's still -- I would think on this statute we're  
9 still talking about a rational basis.

10 THE COURT: Okay. There's some suggestion  
11 that even if it's not heightened scrutiny, it should at  
12 least be intermediate scrutiny. Have you given any  
13 thought to whether that's the proper standard?

14 MR. JENSEN: Well, I haven't given -- not on  
15 the Equal Protection Clause. I'm not even sure whether  
16 the Equal Protection Clause even comes in in here.

17 THE COURT: Well, but that's -- the  
18 plaintiffs argue it does. Is your argument you want me  
19 to make the decision on your basis that you don't  
20 believe the Equal Protection Clause applies? Is that  
21 the basis for the argument you want me to accept?

22 MR. JENSEN: No. The basis for the argument  
23 we want you to accept is that --

24 THE COURT: Under equal protection.

25 MR. JENSEN: -- is that the Tenth Circuit

1 has declared that the Utah statute is constitutional.

2 THE COURT: Has the Tenth Circuit ever  
3 addressed the analysis under the Equal Protection  
4 Clause?

5 MR. JENSEN: I think that analysis has been  
6 addressed -- I don't think it was addressed in Potter.  
7 I think it's been addressed by the Utah Supreme Court in  
8 the Holm case.

9 THE COURT: The Holm case did address it but  
10 not the Tenth Circuit.

11 MR. JENSEN: Yes, that's right.

12 THE COURT: Under the standard there must  
13 serve important government objectives. What would you  
14 believe that the government objective for this statute  
15 is?

16 MR. JENSEN: Well, the governmental  
17 objective of this statute is to prevent harms that have  
18 been perpetrated on women, children, young girls and  
19 young boys. There isn't any question what the purpose  
20 of statute is, Your Honor, it's to prevent a whole raft  
21 of harms that are --

22 THE COURT: What evidence or historical  
23 support can you provide that that's why this statute was  
24 adopted? That's not why any of the legislation that  
25 came about that was litigated in the Reynolds case came

1 about, came about for those reasons. It came about  
2 because of attempts to stamp out a religious practice.

3 MR. JENSEN: Well, the Reynolds case talks  
4 about evil consequences from -- that come about from  
5 polygamy.

6 THE COURT: Well, it says western society  
7 has recognized that polygamy is not good, acknowledging  
8 that Asiatic and African societies have recognized it.

9 MR. JENSEN: Well, the court also talks  
10 about the evil consequences. That language is in that  
11 case.

12 THE COURT: But it doesn't talk about the  
13 specific items that you just raised about abuse of  
14 children and abuse of women.

15 MR. JENSEN: Well, I would assume evil  
16 consequences are abuse of children and abuse of women.  
17 I don't know what other evil consequences there are.

18 THE COURT: And that's the objective that  
19 you argue that the court should consider in terms of  
20 weighing whether or not it satisfies muster under the  
21 Equal Protection Clause.

22 MR. JENSEN: Whether or not there are harms  
23 on society absolutely. The government has a legitimate  
24 interest in protecting people from being injured. There  
25 is no question about that.

1                   THE COURT: All right. Let's go to the free  
2 exercise claim. Which standard do you believe applies  
3 under the free exercise claim?

4                   MR. JENSEN: Again, my answer is the same.  
5 We do not have a suspect class, we do not have a  
6 fundamental right, therefore its the rational review.

7                   THE COURT: How would you deal with the fact  
8 that, I think you just acknowledged, that the  
9 legislation that we are dealing with arises out of a  
10 strong history that has religious implications?

11                  MR. JENSEN: Well, the current statute that  
12 was passed in 1973 comes about from the Model Penal  
13 Code, which was the Utah Legislature went through their  
14 criminal code in 1973 and they deleted polygamy from  
15 their statute, they changed the language of the statute,  
16 they made it a bigamy statute, and it conforms to the  
17 Model Penal Code much like the other 49 states in this  
18 country.

19                  THE COURT: The recent -- you reference the  
20 fact that the Reynolds case has been cited recently.  
21 Would you agree or disagree that it has been primarily  
22 cited for the fact that a neutral law of general  
23 applicability is not unconstitutional. That's the  
24 reason -- that's the basis the Reynolds case is largely  
25 cited for?

1                   MR. JENSEN: Yeah. It was cited in that  
2 Smith v. Oregon case and --

3                   THE COURT: Would you also agree that that  
4 is conditioned by the fact that it cannot incidentally  
5 negatively affect a particular religion or religious  
6 group? In other words, the law of neutral applicability  
7 can't be structured in such a way that it negatively  
8 affects a particular religious group.

9                   MR. JENSEN: Oh, yeah, I would agree with  
10 that.

11                  THE COURT: Doesn't this law have a problem  
12 under that test?

13                  MR. JENSEN: No. No, because it applies to  
14 everyone practicing polygamy. Not all of them are  
15 religious.

16                  THE COURT: Do you think the court should  
17 ignore the history as to how we got these laws?

18                  MR. JENSEN: Well, I think we can all agree  
19 on how we got the laws. But, you know what, Your Honor,  
20 every state in the country has the law and not every  
21 state in the country has Mormon polygamists.

22                  THE COURT: All right. But that's how you  
23 want the court to analyze it under that -- your argument  
24 is I should assume that it is a neutral -- a law of  
25 neutral applicability and it doesn't have any impact on



1 any particular religious group.

2 MR. JENSEN: Absolutely.

3 THE COURT: Let's go to the free association  
4 claim, is your argument same?

5 MR. JENSEN: The same. I don't even see  
6 where the free association captures this. Free  
7 association does not apply to marriages. There's no  
8 court that's held that when they discuss marriages that  
9 they granted under the First Amendment free association.

10 THE COURT: Are you aware of the Roberts v.  
11 United States Jaycees case, the United States Supreme  
12 Court 1984?

13 MR. JENSEN: You know, I've seen that case.  
14 I've not read it.

15 THE COURT: I believe the court said that in  
16 that case freedom of association applies in two distinct  
17 instances, one, choices to enter into and maintain  
18 intimate human relationships. Doesn't that apply here?

19 MR. JENSEN: Marriage is more than an  
20 intimate human relationship. Marriage is so much more.  
21 And that's the problem we have with the Lawrence case,  
22 it applies to intimate human relationships. But  
23 marriage is a different -- it's a different animal  
24 altogether. Does it include that? It does. But is it  
25 more? It is so much more. It is the production of

1 children, it is holding yourself out to society, it  
2 deals with our inheritance laws, it deals with our tax  
3 laws, it's throughout our society.

4 THE COURT: But the problem is we had  
5 started out I was asking you your view of how it would  
6 apply, is that this law doesn't appear to make any clear  
7 distinction between conduct that may be harmful to  
8 society simply because someone says that I call that  
9 person my wife. That's the problem, that's the  
10 struggle. If you can help me figure out how this is  
11 different than the enumerable circumstances that are not  
12 criminalized in which people live together, they have  
13 children together, they have multiple partners with whom  
14 they have children, and the state doesn't choose to  
15 criminalize any of that behavior simply because they  
16 don't call each other husband and wife. Now, I'm trying  
17 to understand what additional element comes into play  
18 here that would justify the state criminalizing this  
19 behavior.

20 MR. JENSEN: I'll tell you what makes it  
21 different, and that is the harms, the injuries to  
22 people, particularly children, but also women, that come  
23 out of the polygamist communities. We have a history of  
24 it in this state, we have seen it repeatedly, it goes on  
25 and on, and the stories are in the thousands about the

1    harms to these people. And it applies more to the  
2    polygamist community than it does to society at large.  
3    It applies to more the polygamist communities in this  
4    state than it does to the people you're talking about  
5    that have the illegitimate children and have the  
6    cohabitation and are not married. But the harms are  
7    greater. 14-year old girls of an illegitimate union are  
8    not forced to marry. 15-year old boys of an  
9    illegitimate union are not kicked out of the community  
10   and dumped on the streets of Las Vegas, Phoenix, and  
11   St. George and told to fend for themselves. Children of  
12   illegal union -- of -- illegitimate children of those  
13   unions in this state do not have a higher criminal  
14   record than those in the polygamist communities. The  
15   polygamist communities in every one of those situations  
16   has a higher level of criminality or harm that's caused  
17   to them than any other group you're talking about.  
18   That's why the state has chosen to criminalize it.

19                   THE COURT: How would you respond to the  
20   fact that none of that is implicated by the behavior  
21   that is raised by the plaintiffs in this case?

22                   MR. JENSEN: It's a facial challenge. I  
23   think it makes absolutely no difference. So what.

24                   THE COURT: Okay. I'll analyze it on that  
25   basis.

1                   Would you agree that the strict scrutiny  
2     applies under the Establishment Clause challenge?

3                   MR. JENSEN: No, no. Same answer. It's not  
4     a suspect classification, it's not a fundamental right.  
5     I don't see how you get to the Establishment Clause. It  
6     makes no sense to me. We're not -- the state isn't  
7     establishing a religion by criminalizing bigamy any more  
8     than the 49 other states are establishing a religion by  
9     criminalizing bigamy.

10                  THE COURT: But the Establishment Clause  
11     extends to laws that facially discriminate between  
12     religions. And I've heard your argument that you  
13     believe that on its face it doesn't, but when you look  
14     at the history you have to really wonder how you could  
15     reach that conclusion, and the threat that it imposes to  
16     particular religious communities primarily in this  
17     state, isn't that a fact?

18                  MR. JENSEN: Well, sure. Certainly.

19                  THE COURT: Anything further that you want  
20     to add before I give Mr. Turley an opportunity to  
21     address the court?

22                  MR. JENSEN: Well, give me a minute.  
23     Mr. Turley states in his response memorandum that social  
24     harm -- pursuant to the Lawrence case, social harm is no  
25     longer a basis for a state intruding into the private

1 lives of citizens. Absolutely dead wrong, and that is  
2 probably the key here as to why he and I would disagree  
3 on this, because the Lawrence case says just the  
4 opposite. It says that while the court is cautioned --  
5 the court cautions the states and courts against setting  
6 boundaries on personal relationships. That guidance  
7 applied only so far as there is no threat of, and I  
8 quote, "no injury to a person or abuse of an institution  
9 the law protects." End of quote. That's on page 567 of  
10 the Lawrence case. Injury and social harm to me are  
11 synonymous terms. The Lawrence court is saying that the  
12 state can intervene when there is an injury to a person  
13 or an institution that the law protects.

14               Now, my main emphasis here is on the injury  
15 to a person because it seems replete to me in the  
16 polygamist communities. There are so many thousand  
17 women in this state that will talk about the harms  
18 they've received as a result of being in the polygamist  
19 communities. Those stories, if given the opportunity,  
20 can be presented to the court. But it's pretty common  
21 knowledge in this state that those stories are out  
22 there, and that's the basis upon which the legislature  
23 has acted.

24               Secondly, we're talking about an institution  
25 the law protects. Now, I don't know precisely what the

1 court meant by that, but it is possible that it means  
2 the institution of monogamous marriage. Does the  
3 legislature have a right to pass laws that protect the  
4 institution of monogamous marriage? It seems to me like  
5 the Lawrence court is saying that it does. And I think  
6 that is fundamental to this case, protect individuals  
7 and, secondarily, protect the institution that the law  
8 protects. There isn't any question the law protects  
9 that in this country. All of the states have laws  
10 banning the practice of polygamy. Utah is not unique in  
11 that. We just have more history about it than anybody  
12 else because of our unique history in that regard.

13 THE COURT: Well, are there any further  
14 facts you want to present or argument to the court as to  
15 how you believe this law, given its breadth, protects  
16 the institution of marriage, assuming that that's what  
17 the Lawrence court meant, and by institution it meant  
18 the institution of the monogamous marriage? How do you  
19 believe allowing consenting adults to live together and  
20 make a commitment to each other to provide for each  
21 other during their lives is damaging to the institution  
22 of monogamous marriage?

23 MR. JENSEN: If you're talking about one  
24 person --

25 THE COURT: I'm talking about one plaintiff

1 and his three other co-plaintiffs who all made  
2 commitments to live together, take care of each other,  
3 treat each other in that way, how is that a damage to  
4 the institution of monogamous marriage? It seems to me  
5 it's just the opposite. You've told me that the law  
6 doesn't criminalize people who fail to make that  
7 commitment, and because these people make the  
8 commitment, it's criminalized. Explain why that's  
9 rational.

10 MR. JENSEN: Well, with consenting adults, I  
11 admit if you limit -- if you limit the relationship to  
12 just consenting adults, I understand the argument, but  
13 that is not our fact situation when the legislature is  
14 looking at the practice of polygamy in this state.

15 THE COURT: But that is the application of  
16 the act -- of the statute to the plaintiffs in this  
17 case.

18 MR. JENSEN: But it's not being applied to  
19 the plaintiffs in this case. It's a facial challenge,  
20 this is a facial challenge to the statute. They haven't  
21 been charged.

22 THE COURT: But the statute is so broad that  
23 it implicates these plaintiffs and criminalize them.  
24 I've already found they have standing. And you may be  
25 right in particular cases there wouldn't be any

1 challenge at all, certainly wouldn't be in a case if the  
2 minor is a girl or someone that was forced into a  
3 marriage. Those cases would be easy, but that's not our  
4 case. We have a statute that is broad enough to reach  
5 out and embrace the very people you said you could  
6 understand why the law shouldn't reach them. Help me  
7 understand why the law should be allowed to be that  
8 broad.

9 MR. JENSEN: Well, the fact of the matter is  
10 the statute isn't enforced against that scenario.

11 THE COURT: Doesn't that argue against it?

12 MR. JENSEN: Well, yes. I mean sure. But  
13 it works both ways.

14 THE COURT: So the statute should be found  
15 to be unconstitutional to the extent it is interpreted  
16 so broadly as to apply to these people.

17 MR. JENSEN: I'm sorry, I didn't hear all of  
18 that, Your Honor.

19 THE COURT: So the statute should be  
20 interpreted to be unconstitutional to the extent it can  
21 be interpreted so broadly to apply to these plaintiffs.

22 MR. JENSEN: You never know when a situation  
23 changes.

24 THE COURT: But they should be entitled to  
25 know whether or not their behavior is criminal or not



1 criminal. That's a fundamental principle of the  
2 applicability of a criminal law, it must be clear enough  
3 so a person knows whether or not his behavior is  
4 criminal or not criminal.

5 MR. JENSEN: That is correct.

6 THE COURT: How do these plaintiffs know  
7 whether their behavior is criminal or not criminal?

8 MR. JENSEN: Well, all I can say, Your  
9 Honor, is that the Tenth Circuit repeatedly has upheld  
10 this statute as constitutional. And we submit to you  
11 that --

12 THE COURT: Never in a case like this.

13 MR. JENSEN: Well, that's not true. In the  
14 Bronson v. Swenson case there were no children, there  
15 was no record of abuse, none of that at all, and the  
16 court -- the court goes through that case and very much  
17 delineates the holding in Reynolds, the holding in  
18 Potter, calls that controlling and persuasive and,  
19 therefore, says that the statute is constitutional,  
20 calls it clear precedent. It then goes on and dismisses  
21 the case on other grounds because of standing.

22 THE COURT: It was all dicta.

23 MR. JENSEN: Well, it's all dicta, but we  
24 treat that as if it's meaningless. It's not meaningless  
25 at all. The Tenth Circuit goes through that litany of

1 those cases and specifically states that it's  
2 controlling precedent. I mean the holding of it is on  
3 standing, you're right, but the Bronson v. Swenson case  
4 is that way. The case cited a year and-a-half ago, the  
5 Adgeh case.

6 THE COURT: Same thing. It wasn't cited on  
7 the basis of facts applicable here. It was cited on  
8 another basis.

9 MR. JENSEN: But it also said that Reynolds  
10 and Potter were clearly controlling, clear precedent.

11 THE COURT: For the principle that it has  
12 neutral application.

13 MR. JENSEN: Sure.

14 THE COURT: Okay. Anything further before I  
15 give Mr. Turley an opportunity to speak?

16 MR. JENSEN: That's all, Your Honor.

17 THE COURT: All right.

18 Mr. Turley. And probably the right place to  
19 start is to start with Mr. Jensen's argument that the  
20 legislature can look at a social harm and based on that  
21 argument of social harm decide that a statute is  
22 necessary to prevent broader harm. How do you respond  
23 to his critical argument on that point?

24 MR. TURLEY: Well, first of all, Your Honor,  
25 we have not argued that social harm can never be the

1 basis for a statute, what we've argued is that the  
2 social harm arguments made by the government are  
3 woefully inadequate. You can't just say social harm and  
4 say that that satisfies the standard. To the contrary,  
5 we've cited various cases where the Supreme Court has  
6 said quite forcefully you can't just simply make  
7 conclusory statements. One of the cases would be the  
8 Cleburne case that we cited where the court specifically  
9 said that it will not allow these types of cited  
10 justifications that are, quote, "so attenuated as to  
11 render the distinction arbitrary or irrational." And  
12 with all due respect to my esteemed colleague, I would  
13 suggest that what was on display here shows precisely  
14 that, that the state is offering, quote, "stories,"  
15 close quote, to the court that have not been presented.

16 I want to emphasize one thing, Your Honor,  
17 the state summary judgment motion and brief was 11  
18 pages. Our opening summary judgment brief was 71 pages.  
19 And I did express concern about extending pages when I  
20 could not respond. And, as you know, we also opposed  
21 the timing of the filing which also weighed heavily in  
22 that position. But what the court -- what the state has  
23 said is that it has stories in the thousands that  
24 somehow the court should take judicial notice of, and  
25 that is an invitation to take judicial notice of

1 stereotypes. I can give you stories in the tens of  
2 thousands of monogamous families where abuse has  
3 occurred. It's not appropriate in a summary judgment  
4 motion before a federal court to ask the court to take  
5 judicial notice of that type of evidence. It's not  
6 evidence at all.

7           Now, what I find particularly troubling is  
8 that the state is suggesting that not only could you  
9 assume whatever it means by social harm and it's not  
10 required to put that evidence on, but that it's also  
11 completely immaterial about who the plaintiffs are. As  
12 you know, we have brought both a facial and as applied  
13 challenge. But the most important thing about these  
14 plaintiffs is that they demonstrate that there are  
15 plural families where this type of abuse doesn't occur,  
16 and there are these criminal statutes that allow for the  
17 prosecution when things like child abuse do occur. I  
18 have no idea what the state is referring to when it says  
19 that in just illegitimate unions, as he called it, you  
20 don't have kids being forced out into the street. I  
21 have no idea where that type of evidence comes from.  
22 It's something out of the head of Zeus, but it is not on  
23 the record, and I don't think how you could possibly  
24 find that anywhere on earth. Obviously there's abuse in  
25 families, obviously it's a tragedy. But to simply say

1 you can assume it with regard to plural families, it's  
2 not just unfair, it just can't be done under the federal  
3 rules.

4 Now, the other thing I wanted to address on  
5 that point, Your Honor, is that the state continually  
6 comes back and says whatever social harms mean we're  
7 particularly concerned because these communities are so  
8 insular, which is quite maddening because the reason the  
9 communities are so insular is because the state has made  
10 the status of the relationships a crime. And so this  
11 becomes quite circular. The state says if you have a  
12 plural relationship you're a felon. In fact, the  
13 defendant in this case went public to say these people  
14 are all committing felonies through his subordinates.  
15 That might have something to do with the fact that these  
16 communities remain insular. If you don't want them to  
17 be insular, the first step might be to say we're not  
18 going to criminalize you just for your private  
19 relationship.

20 The other problem that I see in these types  
21 of arguments, Your Honor, and I would love to get to  
22 Reynolds and to Lawrence in a second, is that the court  
23 was probing the question of how you distinguish between  
24 relationships. That's been obvious, you know,  
25 throughout this case that the state has a population

1 that clearly contains some that have adulterous  
2 relationships, it clearly has people that are living  
3 with people who are not their spouses. This statute  
4 criminalizes cohabitation. And the state is locked into  
5 one thing that comes out of the state system, it is not  
6 required to follow the State Supreme Court and its  
7 interpretation of the Federal Constitution, as you know.  
8 But the State Supreme Court is given deference on what  
9 the statute means. And the court in Holm said it  
10 doesn't require marriage. It's all about cohabitation.  
11 They adopted the broadest possible interpretation, and  
12 that, I believe, does control.

13 Now, I also am a little confused with some  
14 of the discussion of the individual counts, Your Honor.  
15 With equal protection I heard the state recognize that  
16 this is a discrete and insular minority. I think it has  
17 to be. But then when we get to free exercise, the state  
18 indicated that this was not a suspect class. And then  
19 when we got to establishment, it said the reason  
20 establishment doesn't apply is because it's not a  
21 suspect class. Establishment doesn't require that you  
22 have a suspect class. That's not part of the test.

23 And, furthermore, when counsel says he  
24 hasn't read Roberts that would explain a lot because  
25 Roberts is the controlling case in this area for free

1 association. And what Roberts says about free  
2 association goes directly to these types of intimate  
3 relationships.

4 Now, Your Honor, the court -- the  
5 government's limited argument in this case focuses  
6 almost entirely on Reynolds, what we call the "Hail  
7 Mary" pass, and it's a pass that is meant to clear  
8 Lawrence, which is the most recent discussion of the  
9 Supreme Court, and throw the ball back to the Nineteenth  
10 Century and to rely on a case that is widely condemned  
11 as one of the most vile and prejudicial cases in its  
12 language that the court has ever handed down. To  
13 suggest that Reynolds is still good law, I have to  
14 submit, with all due respect, is perfectly bizarre.  
15 Reynolds was saying the very thing that the state  
16 finally admitted it would not say in this case. If you  
17 look at the last series of briefs, the state said, to  
18 its credit, that it will not argue nor can it argue that  
19 morality alone can be the basis for a statute. That's  
20 exactly what Reynolds is arguing. Reynolds, as we've  
21 quoted, makes repeated reference to upholding the good  
22 order in morals of society, to use the defendant's  
23 language. It is important to remember that Reynolds was  
24 the same group of justices that handed down *Pace v.*  
25 *Alabama* for the same reason when it allowed the

1 criminalization of marriages of mixed races. That was  
2 overturned in Loving. And the only reason I raise that  
3 is not only was it this particular court that handed  
4 down Reynolds, honored almost consistently with reversal  
5 in later years. But if the state's argument is correct,  
6 then Loving should never have happened, Lawrence should  
7 never have happened.

8               Indeed, if you look at Reynolds, the court  
9 asserts that it can, meaning the state, define the scope  
10 of any marriage. On page 166 it says, It is within the  
11 legitimate scope of the power of every civil government  
12 to determine whether polygamy or monogamy shall be the  
13 law of social life under its dominion. Now, we read  
14 that today and it seems to come from a different planet.  
15 But that's the statute that the state is citing. Under  
16 that analysis the State of Utah could literally  
17 criminalize monogamy or it could go back and criminalize  
18 mixed race marriages. Obviously it can't do that. And  
19 obviously Reynolds has been tossed to the dustbin of  
20 history. It is still cited for the limited proposition  
21 that a general and neutral statute falls under the  
22 standard that the court discussed earlier.

23               Now, the other aspect of this "Hail Mary"  
24 pass by the state is to make reference to the Tenth  
25 Circuit, particularly the Potter case, which they put a



1 lot of emphasis on. But the problem with Potter is it  
2 came in 1985, and so that occurred before Lawrence. It  
3 would be rather odd to apply the ruling of the Tenth  
4 Circuit as to the meaning of these questions, but not  
5 the Supreme Court's decision in Lawrence 18 years later.  
6 But I also note, by the way, that the reliance on Potter  
7 is extensive, and I don't understand how, because at  
8 most Potter would apply to the Free Exercise Clause and  
9 privacy claim, but I don't see how it could possibly  
10 apply to these other claims.

11               What we would submit to the court is that  
12 the state summary judgment motion is woefully inadequate  
13 to make out a case for summary judgment. But, as you  
14 know, this is a combined argument they folded in both  
15 their opposition to us in our motion and as well as  
16 making their motion. And these arguments are, of  
17 course, repeated. And we would submit to the court that  
18 we believe that the state's fundamentally wrong on these  
19 standards and we think the court has spoken very clearly  
20 on it. But more importantly there is no way to get from  
21 here to there for the state. For the court to do what  
22 the state is asking it would have to say that we are  
23 living under Reynolds, it would have to take us back to  
24 the Nineteenth Century. We are not arguing in this case  
25 for the recognition of plural marriage. We've said that

1 over and over again.

2                   When the state says every state has these --  
3 this same law, that's simply not true. The Utah law is  
4 fundamentally different in its use of cohabitation. If  
5 you look at other states, they focus on multiple  
6 marriage licenses, and we do not contest that you can  
7 prosecute people for multiple marriage licenses and we  
8 do not contest that you can prosecute people for a  
9 collateral crime. That's just not precedent in this  
10 case. And, more importantly, those are not distinctions  
11 under the statute.

12                   That's all we have right now, Your Honor.

13                   THE COURT: Let me ask a question to follow  
14 up. With respect to this court's requirement to follow  
15 Tenth Circuit precedent and guidance, tell me your best  
16 argument as to why this court is not required to accept  
17 the Tenth Circuit's pronouncement that these laws have  
18 been recognized as being constitutionally sound and I  
19 should follow them.

20                   MR. TURLEY: Well, first of all, Your Honor,  
21 the cases cited by the government do not involve the  
22 majority of claims that we have brought. Many of those  
23 cases dealt with dicta, but they certainly did not raise  
24 these specific claims.

25                   Second, as we know, Potter came before

1 Lawrence. Lawrence is controlling, not Potter. And to  
2 the extent that Potter did apply, it would only apply to  
3 those two claims, but it doesn't apply to those claims  
4 because the last time I checked, the Supreme Court was  
5 the higher authority to the Tenth Circuit. I don't see  
6 any Tenth Circuit case that bars the relief that we're  
7 asking for here.

8 THE COURT: All right. One final question,  
9 on the free speech claims, as I understand the  
10 government's argument, it is in this case that the  
11 Browns brought the public investigation and accusations  
12 upon themselves and, therefore, because they did that,  
13 they shouldn't be allowed to argue that this is somehow  
14 an imposition of their free speech claims. How do you  
15 respond to that argument?

16 MR. TURLEY: Well, Your Honor, I find that a  
17 curious argument because that's basically saying, look,  
18 if you didn't speak, you wouldn't have a free speech  
19 problem. That's what it basically comes down to. It's  
20 your fault. You should have stayed quiet. And there's  
21 no question the Browns wanted to show people that a  
22 plural family is not one of these compound monstrosities  
23 that the state keeps on describing. There's a great  
24 number of plural families that are law abiding, they  
25 live within society, they don't commit these collateral

1 crimes. But all the state can say is, you know, if you  
2 had simply not done the television show, you wouldn't  
3 have a problem. That's exactly what Chief Justice  
4 Roberts strongly condemned in FEC v. Wisconsin Right to  
5 Life when he said you can't analyze a free speech case  
6 by considering whether they would have been treated  
7 differently, quote, "by changing what they say." That's  
8 ultimately what the state wants. The state is saying,  
9 look, if you just didn't have a show about you and did a  
10 show about making duck calls, or living on the Jersey  
11 shore, we wouldn't have any problem with you. Well,  
12 that's just not the test. The test is do they have a  
13 right to speak and is it because of that speech that  
14 they have been prosecuted. And the state has not been  
15 particularly subtle. They have said from the beginning  
16 we started the investigation because of this television  
17 program, and then they went out publically and said they  
18 are committing felonies every night on this television  
19 program. It was the state that actually established  
20 this close nexus.

21 THE COURT: I've thought of a couple more  
22 questions. One, how would you believe that this court  
23 should deal with the Enabling Act?

24 MR. TURLEY: Your Honor, we note in our  
25 brief, in one of the footnotes in our brief, the

1    Enabling Act does not limit the State of Utah in this  
2    regard for a couple of reasons. One is, first of all,  
3    even if the Enabling Act has any continuing control over  
4    the state or authorities, it is promising not to  
5    recognize a polygamist marriage. We're not asking for  
6    recognition. We're asking what Louis Brandeis said was  
7    the most important right under the Constitution, is the  
8    right to left alone. There's only one marriage license  
9    in the Brown family, and they haven't even sought any  
10   more licenses, nor do they expect to or want to.

11               Second, as the district court has said  
12   previously, as we cited in the brief, once you're in the  
13   union, you're in the union, and it does not impose  
14   continuing limitations. In fact, you know, we fought a  
15   civil war to say that you can't get out of the union.

16               THE COURT: Would your argument be the same  
17   under the so-called irrevocable ordinance?

18               MR. TURLEY: It would. The state clearly  
19   has the authority to do what the other states have done,  
20   and that is to prohibit multiple marriage licenses, but  
21   to get out of the business of telling people what is  
22   criminal about their private relationships.

23               THE COURT: One of the principles that the  
24   courts are admonished to follow is to construe and  
25   interpret the case on the narrowest constitutional

1 ground possible. What do you believe the narrowest  
2 ground on which this court can find for the plaintiffs  
3 is?

4 MR. TURLEY: Well, Your Honor, I think that  
5 of all of the constitutional claims I would have to say  
6 the Due Process Clause is the most direct because if you  
7 look at what Lawrence says, it seems to be talking about  
8 this case. If you -- at the end of one of our briefs we  
9 note that the Supreme Court said, The petitioners are  
10 entitled to respect for their private lives. The state  
11 cannot demean their existence or control their destiny  
12 by making their private sexual conduct a crime. Their  
13 right to liberty under the Due Process Clause gives them  
14 the right to engage in their conduct without  
15 intervention of the government. It is a promise of the  
16 Constitution that there is a realm of personal liberty  
17 which the government may not enter. The Texas statute,  
18 they conclude, furthers no legitimate state interest  
19 which can justify its intrusion into the personal and  
20 private life of the individual. To me there is no  
21 distinction to draw in that respect.

22 Now, in terms of striking down the statute,  
23 it will be rather difficult. The state can simply pass  
24 a statute, as have the other states, and make it a crime  
25 to give multiple marriage licenses. That's a very easy

1 thing to do. They just can't use this statute. And  
2 quite frankly I think that they will have to come to  
3 grips with it, if they haven't already. The statute is  
4 well outside the lines of anything described by the  
5 Supreme Court.

6 THE COURT: Thank you.

7 MR. TURLEY: Thank you, sir.

8 THE COURT: Mr. Jensen, I'll give you an  
9 opportunity to respond, and I would appreciate one  
10 response particularly. As counsel has argued, this  
11 court is required to give deference to the Utah Supreme  
12 Court in its interpretation of the breadth of the  
13 statute. Do you agree that this court must give  
14 deference to the Holm court in terms of interpreting how  
15 broadly this state interprets the statute?

16 MR. JENSEN: Yes.

17 THE COURT: So whether or not it passes  
18 constitutional muster is a different question for this  
19 court and which I'm not required to follow the Utah  
20 Supreme Court; would you agree with that?

21 MR. JENSEN: Yes.

22 THE COURT: Okay. The second question I  
23 would like you to respond to is Mr. Turley has argued  
24 that the narrowest ground upon which this court can find  
25 for the plaintiff is under the Due Process Clause. As I

1 understand your argument, primarily it is that this  
2 statute is adequate to protect the institution of  
3 marriage, that's your sole argument under the Due  
4 Process Clause.

5 MR. JENSEN: No, not under the Due Process  
6 Clause, under the right of privacy. I mean I think  
7 injury to persons. There's no right that -- the state  
8 can step in, even under the Due Process Clause to  
9 protect injury to persons. That's not our sole  
10 argument, to protect the institution of marriage of  
11 monogamous marriage.

12 THE COURT: What is -- interpreted as  
13 broadly as it does applied to consenting adults who  
14 choose to live together and acknowledge their  
15 relationship, what is the injury to person that you're  
16 talking about?

17 MR. JENSEN: Well, I've enumerated the  
18 injuries to persons.

19 THE COURT: I'm talking -- remember we're  
20 talking about the breadth with which I'm stuck because  
21 of the Utah Supreme Court. I've got to interpret this  
22 as broadly as the Utah Supreme Court did, and at the  
23 very broadest extreme end this applies to three  
24 consenting -- four consenting adults who choose to be  
25 involved in intimate relationships and acknowledge those



1 relationships. So how --

2 MR. JENSEN: I think that is an incorrect  
3 view of this case. That is taking it as an applied  
4 challenge. This is a facial challenge.

5 THE COURT: They do make an applied  
6 challenge. Mr. Turley made that point very clear.

7 MR. JENSEN: Well, he does. But just  
8 because -- I mean he says a lot of things that aren't  
9 true. Just because he says that, doesn't make it true.  
10 The Browns have never been charged. This is not an  
11 applied challenge.

12 THE COURT: Tell me why you believe it's not  
13 an applied challenge.

14 MR. JENSEN: Because the Browns have never  
15 been charged under the statute.

16 THE COURT: They were clearly threatened.

17 MR. JENSEN: Well, kind of.

18 THE COURT: Well, kind of is probably  
19 enough.

20 MR. JENSEN: There was an investigation that  
21 was started, there was kind of -- there was an  
22 investigation that was started, but that doesn't --

23 THE COURT: I've already crossed that  
24 bridge.

25 MR. JENSEN: You've crossed that as to

1 standing, not as to applied challenge. That's  
2 different.

3 THE COURT: Okay. Tell me why it's  
4 different.

5 MR. JENSEN: Because the Browns have never  
6 been charged.

7 THE COURT: Your view of an applied  
8 challenge requires that there must be an actual claim  
9 filed -- or case filed against them before they can make  
10 that challenge.

11 MR. JENSEN: Well, I could get the specific  
12 language, but there's got to be a threatened --  
13 threatened prosecution, and that has never happened.

14 THE COURT: Can the state provide -- or can  
15 the government in this case provide any basis to  
16 conclude that the Browns could not reasonably conclude  
17 that they were threatened by the statute?

18 MR. JENSEN: They were never threatened by  
19 the statute. There was an investigation that was  
20 started.

21 THE COURT: Their conduct clearly falls  
22 within the Holm definition. You would have to agree  
23 with that.

24 MR. JENSEN: I agree with that, you're  
25 right.

1                   THE COURT: So, as interpreted by the state  
2     and applied to their fact situation, how do I find that  
3     their constitutional rights have not been violated under  
4     the Due Process Clause?

5                   MR. JENSEN: I think you have to look at  
6     whether or not the statute has a reasonable basis, a  
7     rational basis.

8                   THE COURT: That's why I'm asking you that  
9     extended to them in this fact situation what's the  
10    rational basis for criminalizing the Browns' conduct?

11                  MR. JENSEN: You have to look at it as the  
12    broad community as a whole.

13                  THE COURT: Any other arguments you wish to  
14    make?

15                  MR. JENSEN: Well, just one, and I maybe  
16    ought not to get to it because it's relatively minor,  
17    but the issue as to cohabitation in the statute, and I  
18    think the statute has to be looked at clearly, the  
19    cohabitation in the statute only applies when someone  
20    holds themselves out to be married. That is a different  
21    situation than cohabitation that generally exists in the  
22    state.

23                  THE COURT: How do you possibly reach that  
24    conclusion in the language of the statute?

25                  MR. JENSEN: Okay. Let me read the statute,

1 and we'll go through it. A person is guilty of bigamy  
2 when knowing he has a husband or wife, or knowing the  
3 other person has a husband or wife, the person purports  
4 to marry another person or cohabitates with another  
5 person.

6 THE COURT: Cohabits can't mean marriage  
7 because --

8 MR. JENSEN: No, it's not marriage, but they  
9 know the other person is married. So they're  
10 cohabitating. That is different than just cohabitation.  
11 Two people can go out and cohabit, and let's admit,  
12 it goes on all the time. But in this situation under  
13 the statute they're not prosecuted unless the one  
14 cohabitating knows that person is married. It's the  
15 same as with the marriage.

16 THE COURT: So it applies to an adulterous  
17 relationship. By definition, adultery is a person who  
18 is married and has intimate relationships with another  
19 person to whom he is not married. That's what you've  
20 just described.

21 MR. JENSEN: All right, Your Honor. But  
22 let's look at how this really works in practice. In  
23 practice there is the marriage, it may not be recognized  
24 by the state, but it is a marriage, it's performed,  
25 there is a wedding ceremony performed, there are vows

1     exchanged. The problem is proving it. The federal  
2     government had that problem in the 1880s. That's why  
3     they added cohabitation to the Edmunds Statute. The  
4     same thing with the Utah statute. The problem was  
5     proving that they were married, so they have added  
6     cohabitante, but the person has to cohabitante knowing  
7     that other person is married.

8                 THE COURT: That sounds like adultery to me.

9                 MR. JENSEN: Well, but they're married.

10                THE COURT: You told me earlier that  
11     adultery is not the intent of this statute.

12                MR. JENSEN: Adultery is not the intent of  
13     this statute.

14                THE COURT: So tell me what's different  
15     between adultery and what you've just described.

16                MR. JENSEN: The one is that they claim to  
17     be married. But just because the state can't prove it  
18     doesn't mean it hasn't happened. That's what's  
19     happening in the polygamist communities.

20                THE COURT: So it's the expression of the  
21     fact that the person is a wife that makes it illegal.

22                MR. JENSEN: Yes.

23                THE COURT: Okay.

24                MR. JENSEN: Yes.

25                THE COURT: Anything further? Mr. Turley,

1 anything further from you?

2 MR. TURLEY: No, Your Honor.

3 THE COURT: Thank you, counsel, for your  
4 arguments. It has been invigorating and mostly helpful.  
5 I appreciate your participation. This is a difficult  
6 issue, and I will rule on it as soon as I can.

7 We will be in recess.

8 (Whereupon, the matter was concluded.)

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1 C E R T I F I C A T E

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3 State of Utah

4 County of Salt Lake

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6 I, Karen Murakami, a Certified Shorthand Reporter

7 for the State of Utah, do hereby certify that the

8 foregoing transcript of proceedings was taken before me

9 at the time and place set forth herein and was taken

10 down by me in shorthand and thereafter transcribed into

11 typewriting under my direction and supervision;

12 That the foregoing pages contain a true and

13 correct transcription of my said shorthand notes so

14 taken.

15 IN WITNESS WHEREOF, I have hereunto set my hand

16 this 1st day of February , 2013.

17

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19 Karen Murakami

20 Karen Murakami, CSR, RPR

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